

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

ELAINE STEVENSON,

NO. CIV. S 03-0201 MCE PAN

Plaintiff,

v.

MEMORANDUM AND ORDER

COUNTY OF SACRAMENTO, CRAIG
HILL, JOHN McGINNESS and DOES
1 through 10, inclusive,

Defendants.

-----oo0oo-----

Through this motion, Defendants move for Judgment as a
Matter of Law ("JMOL") under Federal Rule of Civil Procedure¹
50(b).² Alternatively, the defense requests that the Court order
a new trial on grounds that the verdict reached by the jury was

¹All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

²At the end of Plaintiff's rebuttal case defense counsel
previously moved for JMOL under 50(a). That motion, which was
denied, was a prerequisite for bringing the present Rule 50(b)
motion. Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886-87
(9th Cir. 2002).

1 against the weight of the evidence and resulted in a miscarriage
2 of justice. As set forth below, Defendants' Motion is denied.

3

4 **ANALYSIS**

5

6 **A. Motion for Judgment as a Matter of Law**

7 A JMOL is proper only if "the evidence, construed in the
8 light most favorable to the nonmoving party, permits only one
9 reasonable conclusion, and that conclusion is contrary to that of
10 the jury." White v. Ford Motor Co., 312 F.3d 998, 1010 (9th Cir.
11 2002). To justify relief through a JMOL, there must be a
12 "complete absence of probative facts to support ... [the]
13 conclusion reached so that no reasonable juror could have found
14 for ... [the] nonmoving party." Eich v. Board of Regents for
15 Central Missouri State Univ., 350 F.3d 752, 761 (8th Cir. 2003).

16 Although Defendants also request a Judgment Notwithstanding
17 the Verdict ("JNOV"), that in essence is an outdated reference to
18 what now is properly denominated as a JMOL. See United States ex
19 rel. A Homecare, Inc., v. Medshares Management Group, Inc., 400
20 F.3d 428, 447 n. 14 (6th Cir. 2005). The standards for granting
21 a JMOL and JNOV are identical.

22 Defendants argue that they are entitled to JMOL because of
23 the jury's finding that Defendant McGinness would have made the
24 decision to transfer Elaine Stevenson irrespective of her
25 protected speech arising from the People v. Luna case. Because
26 McGinness made the ultimate decision to transfer Stevenson out of
27 the Homicide Bureau, the defense contends that Defendant Hill
28 cannot be liable since McGinness' decision was based on

1 legitimate grounds.

2 In Mount Healthy City Bd. Of Educ. v. Doyle, 429 U.S. 274
3 (1977), the Supreme Court articulated the proper analysis for
4 assessing claims of illegal retaliation for the exercise of
5 protected speech. Under that analysis, once it is determined
6 that the speech in question is protected (an uncontested fact
7 in the present case), a plaintiff must show that such speech was
8 a "substantial" or "motivating" factor in the decision to take
9 adverse action against him/her. If the plaintiff carries that
10 burden, then the burden shifts to the defendant to show, by a
11 preponderance of the evidence, that the same decision would have
12 been reached even in the absence of the protected conduct. Id.
13 at 287.

14 The defense claims here that because the jury found (in
15 Question No. 3 of its verdict) that Stevenson's protected speech
16 was not a substantial factor in McGinness' decision to transfer
17 her, any improper motive of Hill's in merely recommending the
18 transfer is "superceded and nullified". The defense hence
19 contends that no damages can flow from McGinness' decision under
20 a Mount Healthy analysis.

21 To support its analysis, the defense relies on out-of-
22 circuit authority, most prominently the Eighth Circuit's decision
23 in Ingram v. Nixa Reorganized School Dist., 966 F.2d 1232 (8th
24 Cir. 1992). In that case, the jury awarded the plaintiff damages
25 even though it found that the school district would not have
26 renewed plaintiff's teaching contract irrespective of her
27 protected speech in complaining about certain conduct on the part
28 of the school principal. The district judge entered JNOV on

1 grounds that this posed an inconsistency. In affirming the
2 district court's decision in that regard, the Eighth Circuit
3 found it did not matter that the principal's underlying
4 recommendation was "impermissibly motivated". Because only the
5 school board had actual power to nonrenew plaintiff's contract,
6 the Ingrum court reasoned that the board's decision not to do was
7 made regardless of plaintiff's protected speech. According to
8 the defense herein, the decision in Ingrum is on all fours with
9 the present case and mandates that JMOL be granted.

10 The problem with Defendants' argument, as Plaintiff points
11 out, is that Ingrum is not Ninth Circuit precedent, and cases
12 that have been decided by the Ninth Circuit appear inapposite.
13 In Ostad v. Oregon Health Sciences University, 327 F.3d 876 (9th
14 Cir. 2002), a medical resident claimed that his termination by
15 Oregon Health Sciences University ("OHSU") was motivated by his
16 questioning of billing practices employed by an OHSU physician,
17 Dr. Alan Seyfer. Plaintiff's challenge to Dr. Seyfer's decision
18 to place him on administrative leave, allegedly as a result of
19 patient treatment issues, was referred to a panel of five doctors
20 for review. That panel, which knew nothing about plaintiff's
21 challenge to Dr. Seyfer's billing practices, ultimately decided
22 that plaintiff should be terminated. At trial, the jury
23 nonetheless found that defendants had failed to establish that
24 plaintiff would have been terminated in the absence of his
25 protected speech activity in protesting the billing practices.
26 The district court denied defendants' JMOL request, which was
27 made on grounds that the panel's decision to terminate plaintiff
28 without knowledge of those activities cut off any chain of

1 causation between Seyfer's improper motives and plaintiff's
2 ultimate termination.

3 The Ninth Circuit, after framing the issue in terms of
4 whether the jury "properly could have found, on the record before
5 it, that [plaintiff's] protected conduct played a substantial or
6 motivating factor in the decision to terminate his residency",
7 flatly disagreed with the defense argument that the panel's
8 "independent decision severed any link between Seyfer's allegedly
9 improper motives and [plaintiff's] termination." Id. at 882.
10 The Ostad court approvingly cited the Ninth Circuit's earlier
11 decision in Gilbrook v. City of Westminster, 177 F.3d 838, 855
12 (9th Cir. 1999). Gilbrook held that a subordinate like Defendant
13 Hill cannot use the nonretaliatory motive of a superior
14 (McGinness) as a shield against liability if that superior would
15 never have considered adverse action *but for* the subordinate's
16 retaliatory conduct. Although the Ostad court also cited
17 Gilbrook for the proposition that it did not express any opinion
18 on what the result would be if the facts "showed that the final
19 decision-maker made a wholly independent, legitimate decision to
20 discharge the plaintiff, uninfluenced by the retaliatory motives
21 of a subordinate" (Id. at 883), the circumstances of Ostad
22 demonstrated that Dr. Seyfer laid the groundwork for and
23 initiated the discipline hearings that resulted in plaintiff's
24 termination. The Ninth Circuit therefore found that Seyfer could
25 properly be held liable for his recommendation even though the
26 panel, as the final decision maker, was not aware of plaintiff's
27 protected activity.

28 As indicated above, the Court, in determining whether JMOL

1 is appropriate, must resolve all inferences in favor of Detective
2 Stevenson as the non-moving party. Utilizing that standard, the
3 jury could have determined that Hill's improperly-motivated
4 recommendation in fact "laid the foundation" for the process
5 leading to Stevenson's transfer. That factor, along with the
6 fact that Dr. Seyfer's testimony as to the plaintiff's competence
7 was relied on by the hearing panel, was what the Ninth Circuit
8 accepted in Ostad as the underpinning for Seyfer's liability.
9 Here, the jury heard testimony that McGinness himself had no
10 adverse dealings with Detective Stevenson prior to discussions
11 initiated by Defendant Hill about Plaintiff's allegedly
12 unacceptable behavior, and in fact McGinness had given Plaintiff
13 positive performance evaluations. Given those circumstances, the
14 jury could have reasonably concluded that McGinness would not
15 have taken the action he did absent Hill's recommendations --
16 which the jury found were improperly motivated.

17 As was the case in Gilbrook, the jury found here that while
18 Hill's initial recommendation was made with a retaliatory motive,
19 the ultimate decision by McGinness did not share that motive.
20 Nonetheless, where the retaliatory motive "set in motion the
21 chain of events that led to the adverse employment action",
22 an employee like Hill is not immunized against liability.
23 Gilbrook, 177 F.3d at 855. That reasoning supports the jury's
24 findings against Hill in this case. In addition, the evidence,
25 as construed most favorably to Stevenson, does not unequivocally
26 show that McGinness' decision was "wholly independent" from the
27 recommendations he received from Hill so as to absolve Hill from
28 any liability.

1 Because the jury's finding is not incompatible either with
2 the facts or with applicable case law, JMOL is inappropriate and
3 must be denied.

4

5 **B. Motion for New Trial**

6 As an alternative to their request for JMOL, Defendants also
7 argue that a new trial should be ordered because the verdict
8 ultimately reached by the jury was against the weight of the
9 evidence. A district court has discretion to grant a new trial
10 when the jury's verdict is contrary to the "clear weight of the
11 evidence", or is based on false evidence. Rattray v. City of
12 Nat'l City, 51 f.3d 793, 800 (9th Cir. 1994). A verdict is
13 against the clear weight of the evidence when, after giving full
14 respect to the jury's findings, the judge "is left with the
15 definite and firm conviction that a mistake has been committed by
16 the jury." Landes Const. Co., Inc. v. Royal Bank of Canada, 833
17 F.2d 1365, 1371 (9th Cir. 1987). A new trial may also be ordered
18 when needed to prevent a "miscarriage of justice". Rattray, 512
19 F.3d at 800. In ruling on a motion for new trial, "the judge can
20 weigh the evidence and assess the credibility of witnesses, and
21 need not view the evidence from the perspective most favorable to
22 the prevailing party." Air-Sea Forwarders, Inc. v. Air Asia Co.,
23 Ltd., 880 F.2d 176, 190 (9th Cir. 1989).

24 In support of their request for a new trial, the defense
25 makes the same argument enumerated above -- that Hill was not the
26 ultimate decision maker -- in attempting to argue that the
27 verdict was against the weight of the evidence and/or would
28 result in a miscarriage of justice. Defendants also argue that

1 virtually every witness except Plaintiff and her partner, Dave
2 Wright, testified that Plaintiff was confrontational and
3 disrespectful. They argue that the jury's verdict should not
4 stand against that "overwhelming" evidence. Plaintiff, on the
5 other hand, argues that Defendant Hill made the recommendation to
6 transfer Plaintiff Stevenson just two months after she testified
7 in the People v. Luna suppression hearing, armed with instances
8 of alleged misconduct which for the most part occurred after
9 Stevenson reported Hill's conduct regarding Luna to the District
10 Attorney.

11 Although there was considerable evidence that Stevenson was
12 transferred due to her own volatile behavior, evidence indicating
13 that Hill made the recommendation to transfer Plaintiff soon
14 after she testified at the People v. Luna suppression hearing was
15 also presented. The jury decided that Hill's retaliatory animus
16 as a result of People v. Luna prompted the process that led to
17 her transfer. That conclusion was a plausible one and not
18 contrary to the clear weight of the evidence. The Motion for New
19 Trial is denied.

20

21 **C. Verdict Against Defendant McGinness**

22 In assessing a verdict like the one returned by the jury in
23 the initial phase of this case, which consists of special
24 interrogatories comprising a general verdict, the Court has a
25 duty under the Seventh Amendment to harmonize any seemingly
26 inconsistent answers if permitted by a fair reading of the
27 verdict as a whole. See White v. Ford Motor Co., 312 F.3d 998,
28 1005 (9th Cir. 2002).

1 In this case, although the jury's answer to Question No. 4
2 found that Defendant McGinness would have transferred Plaintiff
3 regardless of her protected speech arising from the People v.
4 Luna case (in response to the same question the jury also found
5 that Defendant Hill would not have recommended her transfer
6 absent her involvement in Luna), the jury nonetheless proceeded
7 to conclude in response to Question No. 5 that Stevenson had
8 suffered damage as a result of the acts or omissions of both Hill
9 and McGinness. In Question No. 6, the jury determined that
10 Plaintiff suffered past economic loss totaling \$20,000 and non-
11 economic damages in the amount of \$75,000 due to those acts or
12 omissions.

13 At oral argument on the post-trial motions in this case,
14 held on September 26, 2005, defense counsel contended that a fair
15 reading of the verdict as a whole cannot support imposition of
16 any damages against Defendant McGinness, since the jury concluded
17 that he acted without knowledge of Plaintiff's protected speech.

18 The Court agrees. The jury concluded that Hill did have
19 retaliatory animus in recommending Plaintiff's transfer and could
20 therefore incur liability on that basis for the transfer pursuant
21 to the Ninth Circuit's holdings in Ostad and Gilbrook as
22 discussed above. However, the jury also concluded in its answers
23 to the special interrogatories that McGinness was not
24 impermissibly motivated in making the actual decision to transfer
25 Plaintiff. As such McGinness is not personally liable for that
26 decision, and cannot be responsible for resulting *monetary*
27 damages, even if Plaintiff was in fact "damaged" by his approval
28 of Plaintiff's transfer. In the Court's view, this is the only

1 fair reading of the jury's response to Question No. 5 which must
2 be viewed in context of the remainder of the verdict, and is
3 therefore the only reading of the verdict that harmonizes any
4 potential inconsistency as required by the Ninth Circuit in
5 White. Hence, the monetary damages awarded by the jury can only
6 be against Defendant Hill.

7 Concurrently with the filing of this order a Second Amended
8 Judgment will also be filed which clarifies that the monetary
9 damages assessed by the jury are against Defendant Hill, only.

10
11 **CONCLUSION**
12

13 Based on the foregoing, Defendants' Motion for Judgment as a
14 Matter of Law, or alternatively for a new trial, is DENIED. The
15 judgment in this matter will, however, be amended to reflect that
16 the monetary damages imposed by the jury are solely against
17 Defendant Hill and that a mistrial was declared on the issue of
18 punitive damages.

19 IT IS SO ORDERED.
20

21 DATED: September 28, 2005
22

23 
24 MORRISON C. ENGLAND, JR
25 UNITED STATES DISTRICT JUDGE
26
27
28